

***United States Court of Appeals  
for the Second Circuit***



**AMICUS BRIEF**





# No. 74-1258

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IN THE  
**United States Court of Appeals**

FOR THE SECOND CIRCUIT

NATIONAL RESOURCES DEFENSE COUNCIL, INC. *Petitioner,*  
v.

ENVIRONMENTAL PROTECTION AGENCY, *Respondent;*

CELANESE CORPORATION, ET AL., *Intervenor.*

On Petition for Review of Action of the Administrator of the  
Environmental Protection Agency

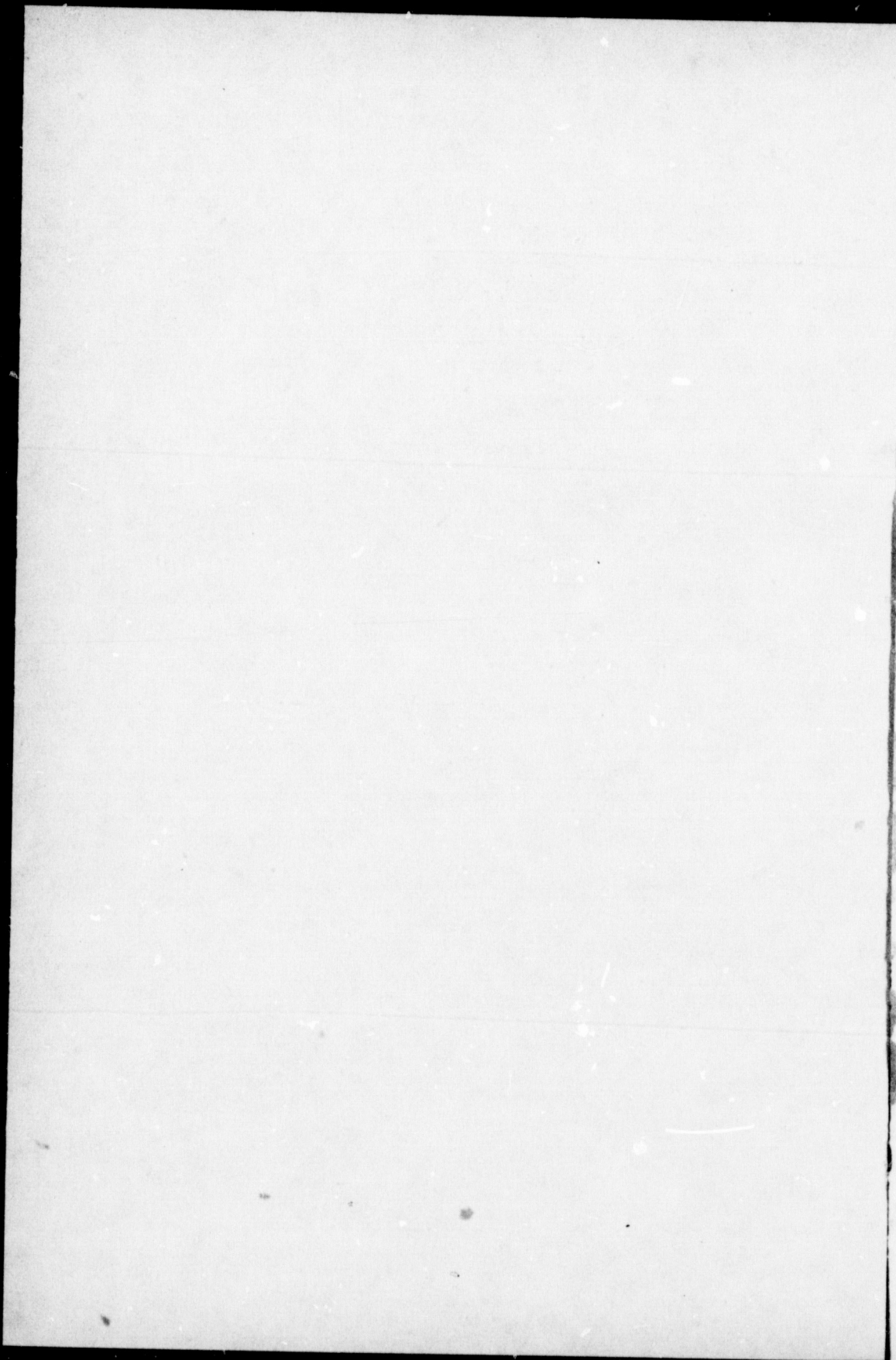
**BRIEF AMICUS CURIAE  
FOR THE  
CHAMBER OF COMMERCE  
OF THE  
UNITED STATES OF AMERICA**

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**BRIEF AMICUS CURIAE  
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**PRELIMINARY STATEMENT**

This is an action brought pursuant to § 509(b) of the Federal Water Pollution Control Act Amendments of 1972 (herein "the FWPCA" or "the Act")<sup>1</sup> in which

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<sup>1</sup> 33 U.S.C. § 1251 *et seq.* References herein to the FWPCA will refer to sections of the Act itself, rather than to its designation in the United States Code. Both petitioner's and intervenor's briefs refer to the FWPCA, so references herein to that act should help this Court compare amicus' position with that taken by those parties.



petitioner, the Natural Resources Defense Counsel, seeks review of identical portions (herein "the variance provision") of the following Effluent Limitations Guidelines issued by the Environmental Protection Agency (EPA) under the FWPCA:

- (a) Part 412, Feedlots Point Source Category, 39 Fed. Reg. 5703 (February 14, 1974);
- (b) Part 426, Glass Manufacturing Point Source Category, 39 Fed. Reg. 5711 (February 14, 1974);
- (c) Part 422, Phosphate Manufacturing Point Source Category, 39 Fed. Reg. 6579 (February 20, 1974);
- (d) Part 411, Cement Manufacturing Point Source Category, 39 Fed. Reg. 6589 (February 20, 1974);
- (e) Part 428, Rubber Processing Point Source Category, 39 Fed. Reg. 6660 (February 21, 1974);
- (f) Part 424, Ferroalloy Manufacturing Point Source Category, 39 Fed. Reg. 6805 (February 22, 1974);
- (g) Part 427, Asbestos Manufacturing Point Source Category, 39 Fed. Reg. 7525 (February 26, 1974);
- (h) Part 432, Meat Products Point Source Category, 39 Fed. Reg. 7893 (February 28, 1974);
- (i) Part 421, Nonferrous Metals Manufacturing Point Source Category, 39 Fed. Reg. 12821 (April 18, 1974).

Amicus, the Chamber of Commerce of the United States, is a national association of more than 3,500 state and local chambers of commerce and trade associations with an underlying membership of over five million business firms and individuals, in both metropolitan and rural areas.

Direct business memberships number in excess of 46,000 with activities ranging from raw material extraction to production of finished goods, as well as many types of services.



Many member businesses are subject to the regulations of the Administrator which are under review in this proceeding. Other member businesses are (or will be) subject to the "variance provisions", identical to those in dispute in this proceeding, which appear in the Administrator's guidelines for other point source categories than those listed above.

Thus, many of the Chamber of Commerce's members will be directly affected by the outcome of this litigation.

The "variance provision" in dispute in this proceeding reads as follows:

In establishing the limitations set forth in this section, EPA took into account all information it was able to collect, develop and solicit with respect to factors (such as age and size of plant, raw materials, manufacturing processes, products produced, treatment technology available, energy requirements and costs) which can affect the industry subcategorization and effluent levels established. It is, however, possible that data which would affect these limitations have not been available and, as a result, these limitations should be adjusted for certain plants in this industry. An individual discharger or other interested person may submit evidence to the Regional Administrator (or to the State, if the State has the authority to issue NPDES permits) that factors relating to the equipment or facilities involved, the process applied, or other such factors related to such discharger are fundamentally different from the factors considered in the establishment of the guidelines. On the basis of such evidence or other available information, the Regional Administrator (or the State) will make a written finding that such factors are or are not fundamentally different for that facility compared to those specified in the Development Document. If such fundamentally different factors are found to exist, the Regional Administrator or the State shall establish for the discharger effluent limitations in the NPDES permit either more or less stringent than the limitations established herein, to the extent dictated by such funda-

mentally different factors. Such limitations must be approved by the Administrator of the Environmental Protection Agency. The Administrator may approve such limitations, specify other limitations, or initiate proceedings to revise these regulations. (See, for example, 39 Fed. Reg. 7897, February 28, 1974)

This provision appears in the regulations promulgated by the Administrator of the Environmental Protection Agency under § 304(b) of the Act. That section requires the Administrator to publish "regulations providing guidelines for effluent limitations." Section 304(b)(1)(B) requires the Administrator to specify factors to be taken into account in the assessment of "best practicable control technology currently available."

Petitioner, the Natural Resources Defense Council, has contended that the Administrator's action in promulgating the regulations, in dispute in this proceeding, was not taken pursuant to § 304 alone, but also under the authority of § 301 of the Act. The Chamber of Commerce will show that § 301 cannot be used to justify the Administrator's action. The Chamber will also show that the concept of flexibility embodied in the disputed variance provision must be upheld so that the states may apply the § 304 guidelines to determine effluent limitations as provided by the Act.

### **ISSUES PRESENTED**

1. Does the Federal Water Pollution Control Act require the Administrator to promulgate guidelines under § 304(b) which create a framework for determining effluent limitations for individual plants by taking into account the various factors listed in § 304(b)?

2. Did Congress intend that the States apply the § 304 guidelines to determine effluent limitations for individual plants?

## SUMMARY OF ARGUMENT

Out of petitioner's expressed fear of active state participation in setting effluent limitations comes its argument that effluent limitations for individual plants can be set only by the Administrator. Petitioner finds the Administrator's authority to accomplish this feat of fixing effluent limitations for every plant in America in § 301 of the Act. *Amicus*, the Chamber of Commerce of the United States, will show that § 301 does not authorize the Administrator to set effluent limitations.

The determination of the "best practicable control technology currently available" is a complex process requiring the permit-grantor to balance the environmental, economic, and social costs and benefits of a given level of effluent reduction in a given plant. The Administrator's guidelines under § 304 are to provide the decision-making framework so the states can make that determination on a uniform basis.

Congress sought to avoid inflexible federal regulations which would prevent the states from applying their superior knowledge of local conditions. Yet, in petitioner's view the guidelines promulgated by the Administrator must preclude the states from using their judgment. This view is inconsistent with the actual federal-state relationship which Congress intended. A comparison of the scheme set forth for the ocean discharge guidelines of § 403 shows conclusively that the states are expected to use their judgment in applying guidelines for effluent limitations. Recognizing that some states might abuse this authority, Congress empowered the Administrator to veto state effluent limitations which fall outside his guidelines.

The Administrator's variance provision is essential to provide the flexibility that Congress intended. It must be amended to allow the states to balance the environmental,



economic, and social costs and benefits of a specific effluent limitation as applied to a specific discharger. Only in this way can the Administrator implement the policy of Congress that the states take the primary role in abating pollution through the mechanism of state permit programs under § 402 of the Act.

## A R G U M E N T

### **I. THE VARIANCE PROVISION IS ESSENTIAL TO ALLOW THE STATE NPDES PERMIT PROGRAMS TO APPLY THE "FINE TUNING" NECESSARY TO DETERMINE THE "BEST PRACTICABLE CONTROL TECHNOLOGY CURRENTLY AVAILABLE" FOR SPECIFIC PLANTS.**

#### **A. THE CONGRESS INTENDED THE "BEST PRACTICABLE CONTROL TECHNOLOGY CURRENTLY AVAILABLE" TO BE DEFINED BY A COMPLEX BALANCING PROCESS TAKING INTO ACCOUNT ENVIRONMENTAL, SOCIAL AND ECONOMIC FACTORS IN ORDER TO PROMOTE THE PUBLIC GOOD.**

##### **1. Congress' Overriding Intention Was That Water Pollution Control Be Compatible With the Attainment of Such National Goals as Clean Air, Energy Conservation Economic Productivity, and High Employment.**

When Congress deliberated upon the Federal Water Pollution Control Act Amendments of 1972, it understood that reducing water pollution entails economic, social, and even environmental costs.

Former Administrator William Ruckelshaus explained to the House Public Works Committee that total environmental impact should be the paramount consideration in determining the Act's goals:

What does this do to energy; what effect does it have on the environment; what does it do to the ground water supply; land use; air pollution. All of these things ought to be considered before we set [a no-discharge] goal. (118 Cong. Rec. 10229 (1972), 1 Leg. Hist. 414)

The economic and social costs associated with water pollution control were also prime considerations of the legislators responsible for the bill. Representative John Blatnik, Chairman of the House Public Works Committee, described the Committee's view of the purposes of the Act:

Those of us on the Public Works Committee who have worked long and hard to bring this comprehensive and enormously complex bill into being are proud of our handiwork. We consider it a landmark in the field of environmental legislation, a nonpartisan act to which the entire committee has given many, many months of thoughtful consideration, *bearing always in mind the consequences of our actions on the whole economic and social structure of the Nation.* (118 Cong. Rec. 10204 (1972), 1 Leg. Hist. 350) [emphasis added]

Congressman Harsha, one of the members of the House Public Works Committee whose leadership brought the bill to the House floor, explained that this bill was an attempt by his committee to reconcile the goal of attaining clean water with the achievement of other, sometimes conflicting national goals:

We, as Members of Congress, in considering this environmental control bill on the floor of the House must remember that environmental control is one of a number of competing national priorities. These other national priorities include *full employment, price stabilization, rural development, social development, energy supply, a wider sharing of an improved standard of living, retention of our foreign trade capabilities and protection of our natural resources.* I believe the Committee on Public Works has properly considered each of these priorities while developing H. R. 11896. (118 Cong. Rec. 10205 (1972), 1 Leg. Hist. 352) [emphasis added]

Representative Clarence E. Miller of Ohio, a member of the House Public Works Committee and the Conference

Committee, cited specific circumstances under which the attainment of a zero discharge water pollution control level would have an *adverse* net environmental impact.<sup>2</sup>

Representative Harsha, who also served on the Conference Committee as well as the House Public Works Committee, explained that consideration of competing

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<sup>2</sup> "Coal that is burned to operate the pollutant removal facilities will produce large amounts of fly ash, sulfur dioxide, nitrogen oxides, and B.t.u.'s of waste heat to be disposed of through the air. If land disposal is used, serious problems exist, especially with heavy metals and chemicals, in terms of land availability and costs, transportation, land treatment techniques, and soil and underground water contamination.

One very enlightening example of this transferral problem was posed to the committee. To achieve the zero discharge level, one chemical plant has estimated it would annually take 9,000 tons of chemicals, 1,500 kilowatts continuous over a year of electric power, and a quantity of steam that would require 19,000 tons of coal to generate; 15,000 tons of natural resources would be required to produce the 9,000 tons of chemicals and 6,000 tons of coal would be required to produce the 1,500 kilowatts of electric power continuously over a year. The 1,500 continuous kilowatts of electric power would produce 300 tons of fly ash, 350 tons of sulfur oxides, 60 tons of nitrogen oxides, and billions of B.t.u.'s per year waste heat.

Each year 9,000 tons of chemical sludge would be generated creating a separate solid waste disposal problem. The plant would generate in producing the steam 1,200 tons of fly ash, 1,000 tons of sulfur and 200 tons of nitrogen oxides. Suppliers of the 9,000 tons of chemicals would generate 6,400 tons of chemical wastes, including 1,700 tons of chloride wastes and 800 tons of iron sludge. For this one plant, 40,000 tons of natural resources would be consumed to remove 4,000 tons of pollutants from the water and 20,000 tons of additional wastes—solid wastes and air pollution—would be produced to achieve a zero discharge. In other words, five times more pollutants would be produced than would be removed from the plant.

Another major manufacturing concern has calculated that at one of its facilities it is technologically feasible to reduce copper residual to 0.40 p.p.m. However, such a reduction is theoretically obtainable only at pH values greater than pH 9. This would create a high demand for lime, 60 percent of which would persist as sludge, with the excess lime required beyond pH 8 passing into receiving waters as dissolved solids. Thus, as a result of installing the best available technology two new pollution problems which had not existed before would be created having an adverse overall net environmental effect." (118 Cong. Rec. 10229-30 (1972), 1 Leg. Hist. 414))



national priorities prompted the committee to require standards which take these competing goals into account:

Mr. Speaker, as I stated in my introductory remarks, water pollution control cannot exist in a vacuum, isolated from other considerations of the Federal Government.

*The committee recognizes there are many competing national priorities. That is the very reason the committee has placed in this legislation the flexibility that is needed for the executive branch.* (118 Cong. Rec. H9122 (daily ed. October 4, 1972), 1 Leg. Hist., 244) [emphasis added]

The Senate, too, understood its duty to weigh the inevitable trade-offs associated with water pollution control. Senator Jennings Randolph, Chairman of the Senate Committee on Public Works and a member of the Conference Committee, explained that standards under the Act were not intended to be formulated in disregard of the associated economic and social costs:

The committee does not want to impose impossible goals, nor does it intend to require expenditures so excessive that they would undermine our economy. Consequently, under the proposed legislation, controls must relate the economic and social benefits to be gained with the economic and social costs to be incurred. (117 Cong. Rec. 38805 (1971), 2 Leg. Hist. 1272)

Yet, Congress realized that it had insufficient information to quantify the economic and social costs which inevitably accompany the economic and social benefits of water pollution control. Recognition of the need to counterbalance conflicting national goals provoked Congress to pass § 10 of the Federal Water Pollution Control Act Amendments of 1972:

*Sec. 10. The President shall make a full and complete investigation and study of all of the national policies and goals established by law for the purpose of*

*determining what the relationship should be between these policies and goals, taking into account the resources of the Nation.* He shall report the results of such investigation and study together with his recommendations to Congress not later than two years after the date of enactment of this Act. There is authorized to be appropriated not to exceed \$5,000,000 to carry out the purposes of this section. (Federal Water Pollution Control Act Amendments of 1972, § 10; emphasis added)

Congress authorized many other studies of the costs of water pollution control.<sup>3</sup> Senator Muskie, a member of both the Senate Public Works Committee and the Conference Committee, explained that the reason for these studies was the dearth of information on treatment costs and benefits, a consideration of such importance that Congress later refused to make "no discharge" a requirement for 1983:

Mr. President, the committee recognizes that doubts exist on the economic and social costs, the economic and social benefits, of the national objective stated in the pending bill. The committee also recognizes that doubts exist about the link between pollution and water quality.

That is why the committee recommends the comprehensive information and reporting sections of the bill which will provide for the Congress the knowledge to decide by the mid-1970's whether the course set now should be changed. (117 Cong. Rec. 38801 (1971), 2 Leg. Hist. 1263)

In his opening remarks introducing the House Public Works Committee version of the federal water pollution control bill to the entire House, Committee Chairman Blatnik, like Senator Muskie, emphasized that Congress was forced to legislate without reliable information about

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<sup>3</sup> See the Federal Water Pollution Control Act, sections 104(a)(6), 507(e), 315(a), 305(b)(1)(D).



the costs and environmental impact of controlling water pollution:

What would a no-discharge requirement in 1981 or 1985 cost?

Even more important, what would be the impact of such requirements on other environmental problems? Would we create solid waste disposal problems? Would we create air pollution problems? Are there deleterious effects of large scale land disposal? Ask yourself. Do you know the economic costs? The other environmental impacts?

I must admit I do not; the committee does not. I would like to read from the Congressional Record of November 2, 1971, which reports the debate on S.2770, the companion bill in the other body. A Senator from Kansas asked the following question of the chairman of the Air and Water Pollution Subcommittee in the other body and I read from the Record:

"The other question I wish to ask the Senator is whether some estimate or judgment has been made as to the cost of achieving zero discharge by 1985, both as to capital cost and operative cost."

The answer from the chairman of the Air and Water Pollution Subcommittee was:

"There are no estimates of that kind that, in my judgment, have any validity." (118 Cong. Rec. 10205 (1972), 1 Leg. Hist. 354)

Thus, Congress recognized its own inability--due to lack of information--to weigh the costs and benefits of water pollution control. But Congress nevertheless believed that this balancing process is so important to rational decision-making about pollution abatement that it included a comprehensive cost/benefit analysis—including economic and social as well as environmental costs and benefits—in the standard-setting process for every effluent limitation re-

quired by the Act.<sup>4</sup> Accordingly, Congress required in § 104(a)(6) that the Environmental Protection Agency develop methods for measuring these costs:

“Sec. 104. (a) The Administrator shall establish national programs for the prevention, reduction, and elimination of pollution and as part of such programs shall—

“(6) initiate and promote the coordination and acceleration of research designed to develop the most effective practicable *tools and techniques for measuring the social and economic costs and benefits* of activities which are subject to regulation under this Act; and shall transmit a report on the results of such research to the Congress not later than January 1, 1974. [emphasis added]

Congress was particularly concerned with the economic impact of the effluent limitations issued under the Act. Accordingly, in § 507(e), Congress required the Environmental Protection Agency to conduct hearings to investigate threatened plant closures or reductions of employment:

“(e) The Administrator shall conduct continuing evaluations of potential loss or shifts of employment which may result from the issuance of any effluent limitation or order under this Act, including where appropriate, investigating threatened plant closures or reductions in employment allegedly resulting from such limitation or order. Any employee who is discharged or laid-off, threatened with discharge or lay-off, or otherwise discriminated against by any person because of the alleged results of any effluent limitation or order issued under this Act, or any representative of such employee, may request the Administrator to conduct a full investigation of the matter. The Administrator shall thereupon investi-

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<sup>4</sup> Section 307(a) of the Act which provides for setting effluent standards for toxic pollutants contains no *express* directive to consider costs, but such a directive could be implied.

gate the matter and, at the request of any party, shall hold public hearings on not less than five days notice, and shall at such hearings require the parties, including the employer involved, to present information relating to the actual or potential effect of such limitation or order on employment and on any alleged discharge, lay-off, or other discrimination and the detailed reasons or justification therefor."

In § 315(a) of the Act, Congress established a "National Study Commission" to investigate "all of the technological aspects of achieving, and all aspects of the *total economic, social, and environmental effects*" of the effluent limitation standard set forth for 1983. § 315(a); emphasis added. Annual comprehensive cost/benefit studies by the States are required in § 305(b)(1)(D):

"(b)(1) Each State shall prepare and submit to the Administrator by January 1, 1975, and shall bring up to date each year thereafter, a report which shall include—

"(D) an estimate of (i) the environmental impact, (ii) the economic and social costs necessary to achieve the objective of this Act in such State, (iii) the economic and social benefits of such achievement, and (iv) an estimate of the date of such achievement . . ."

The breadth of these studies is instructive. They are not narrow investigations into equipment costs and operating costs. They reflect Congressional recognition of the importance of the immense potential impact of standard-setting on a wide range of other national interests, including (1) the economy; (2) employment levels; (3) energy consumption;<sup>5</sup> (4) air quality and land use; (5)

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<sup>5</sup> "The managers expect the Administrator to give full consideration to energy requirements. This does not mean that we simply expect him to consider the air pollution impact of increased energy requirements for improved water quality control. It means that *the managers expect the Administrator to consider the full impact of the energy crisis facing the United States*. It must also point out that difference in wording between section



competition with foreign products;<sup>6</sup> (6) the impact on the local community or region;<sup>7</sup> and other effects included in the phrase "economic and social costs."

**2. Section 304 of the Act Requires the Administrator To Publish Guidelines for Establishing 1977 Effluent Limitations Which Take Into Account Social, Economic, and Environmental Costs.**

Section 301 of the Act requires that by 1977 effluent limitations be achieved which require the application of the "best practicable control technology currently available" as defined by the Administrator of the EPA pursuant to § 304(b). In § 304(b), Congress required the EPA to publish regulations "providing guidelines for effluent limitations" in two steps.

First, the Administrator must identify the "best practicable control technology currently available for classes and categories of point sources" in terms of numerical effluent pollution limits. Second, he must "specify factors to be taken into account in determining the control measures and practices to be applicable to point sources (other than publicly owned treatment works) within such categories or classes."

Senator Randolph, Chairman of the Senate Public Works Committee, explained that "available" technology

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304(b)(1)(B) and section (b)(2)(B) and section 306(b)(1)(A) is not intended to signify a difference in the level of consideration to be given to energy requirements by the Administrator. (118 Cong. Rec. H9131 (daily ed. October 4, 1972), 1 Leg. Hist. 269) (Remarks of Representative Clarence E. Miller, a member of the Conference Committee.) [emphasis added]

<sup>6</sup> FWPCA, § 6(a).

<sup>7</sup> 118 Cong. Rec. S16881 (daily ed. October 4, 1972), 1 Leg. Hist., 188; 118 Cong. Rec. H9117 (daily ed. October 4, 1972), 1 Leg. Hist. 231; 118 Cong. Rec. 10259 (1972), 1 Leg. Hist. 492.

must be *effective* technology in the sense that the benefits of its use outweigh the costs:<sup>8</sup>

Another important feature of this bill is the recognition it gives to the effectiveness and cost of various abatement technologies. The requirements it makes are based, to an important degree, on the use of available technology that has been adequately demonstrated to be effective. So the available technology is something that we are going to use to the *n*th degree.

The committee does not want to impose impossible goals, nor does it intend to require expenditures so excessive that they would undermine our economy. Consequently, under the proposed legislation, controls must relate the economic and social benefits to be gained with the economic and social costs to be incurred. (117 Cong. Rec. 38805 (1971), 2 Leg. Hist. 1272)

Accordingly, Congress required the Administrator to specify factors which would require the grantor of the permit<sup>9</sup> to weigh the total economic, social, and environmental costs against the benefits of a specific effluent limitation for a specific point source:

Factors relating to the assessment of best practicable control technology currently available to comply with subsection (b)(1) of section 301 of this Act shall include consideration of the total cost of the application of technology in relation to the effluent reduction benefits to be achieved from such application, and shall also take into account the age of the equipment and facilities involved, the process employed, the

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<sup>8</sup> Although the cost/benefit analysis must be comprehensive, it need not attain mathematical precision because value judgments are necessary to compare the weight assigned to many of the factors. There must, however, be at minimum a "reasonable relationship" between the costs and benefits. (Remarks of Senators Bentsen (117 Cong. Rec. 38809 (1971), 2 Leg. Hist. 1281), Buckley (117 Cong. Rec. 38817 (1971), 2 Leg. Hist. 1300), Muskie (118 Cong. Rec. S16873 (daily ed. October 4, 1972), 1 Leg. Hist. 170) and (117 Cong. Rec. 38801 (1972), 2 Leg. Hist. 1263) and Rep. Wright (118 Cong. Rec. H9128 (daily ed. October 4, 1972), 1 Leg. Hist. 259-60).

<sup>9</sup> As opposed to the Administrator himself, as will be explained below.

engineering aspects of the application of various types of control techniques, process changes, non-water quality environmental impact (including energy requirements), and such other factors as the Administrator deems appropriate (§ 304)(b)(1)(B))

Representative Robert Jones, a key member of the House Public Works Committee and the Conference Committee, explained the meaning of the words "total cost of application of technology" in the Conference Committee substitute of § 304(b):

The term "total cost of application of technology" as used in section 304(b)(1)(B) is meant to include those internal, or plant costs sustained by the owner or operator and those external costs such as potential unemployment, dislocation, and rural area economic development sustained by the community, area, or region. (118 Cong. Rec. H9117 (daily ed. October 4, 1972), 1 Leg. Hist. 231)<sup>10</sup>

Thus, the factors listed in § 304(b)(1)(B) were intended to provide a framework for consideration of the economic, social, and environmental costs and benefits.

Senator Muskie described the complexity of the judgmental process with regard to the § 304 guidelines, which require "judgments involving a complex balancing analysis of factors that include economic, technical, and other considerations." (118 Cong. Rec. S16878 (daily ed. October 4, 1972), 1 Leg. Hist. 181) Senator Muskie explained that guidelines for effluent limitations would provide the framework for a comprehensive cost/benefit analysis which goes far beyond the cost/benefit analysis mandated by the National Environmental Policy Act:

NEPA requires, in Section 102(2)(B), for example, that agencies of the Federal government identify and

<sup>10</sup> Representative Wright, a member of the House Public Works Committee and the Conference Committee, also stated that "total cost" of "best practicable control technology", includes both internal and external costs. (118 Cong. Rec. H9128 (daily ed. October 4, 1972), 1 Leg. Hist. 259-60)



develop methods and procedures "which will ensure that presently unquantified environmental amenities and values may be given appropriate consideration in decision making along with economic and technical considerations." *The ground rules for this kind of finely-tuned, systematic balancing analysis are explicitly set out repeatedly in the FWPCA.* This Act specifically identifies factors to be considered by the Administrator in making this kind of balancing analysis and the Conferees concluded that *the substantive purposes and procedures of the Act fully satisfy and go far beyond what is required by 102(2)(B).* (118 Cong. Rec. S16878 (daily ed. October 4, 1972), 1 Leg. Hist. 182) [emphasis added]

In summary, the concept "best practicable control technology currently available" can be implemented only by a comprehensive analysis which includes consideration of the economic, social, and environmental costs as well as the benefits of an effluent limitation. The next section of this brief describes how the actual effluent limitation must be determined: the Administrator must provide a comprehensive framework for decision making so that the states can weigh the many relevant factors in order to apply the uniform federal guidelines to the enormous variety of factual situations in which the guidelines must operate. The Administrator's regulations implementing § 304(b) will enable the States to formulate precise effluent limitations in state permits for individual dischargers.

**B. THE FEDERAL § 304 GUIDELINES FOR DECISIONMAKING MUST BE APPLIED BY THE PERMIT GRANTING AUTHORITY, NOT THE ADMINISTRATOR HIMSELF.**

Petitioner, the National Resources Defense Counsel, has attempted to minimize the role of the states under the Federal Water Pollution Control Act. Petitioner contended that "It is the Administrator [rather than the states] that sets every standard in the Act, other than § 303 ambient water quality standards." (Brief for Petitioner, page 42) This assertion is false, if by the term

"standards" petitioner intends to refer to effluent limitations. States are clearly given authority under the Act to establish effluent limitations for discharges into lakes (§ 314), the ocean (§§403(e); 402(b)(1)), and limitations on thermal discharges (§ 316), as well as limitations applying § 304 guidelines (as will be explained below). Petitioner concludes its brief with this dire warning:

By this argument intervenor exposes the fundamental practical flaw in their position. If their approach is adopted, it is likely that the responsibility of standard setting for existing discharges will s[li]p inevitably from the Administrator to the states. (Brief for Petitioner, pages 42-43)

This statement, too, is false because intervenor contended only that the states *apply* federal guidelines set forth in § 304 regulations. Intervenor did not contend that the states *issue* those regulations. Petitioner's fear of active state participation was emphatically rejected by Congress when it passed the Federal Water Pollution Control Act Amendments of 1972. The legislative history and text of the Act show that Congress intended the states to take the primary role in water pollution control, subject to federal review and veto if state action was violative of the purposes of the Act.

The Chamber of Commerce recognizes that the nature of the state role in setting effluent limitations is crucial to the resolution of the issues before this Court; consequently, it will address itself primarily to that issue in the remainder of this brief.

#### **1. Congress Sought To Avoid Inflexible Federal Standards Which Would Stifle State Initiative.**

Petitioner states that the Administrator has promulgated regulations which set rigid, inflexible effluent limitations for all point sources within a category or class. Under this view, these regulations, with the exception of the variance provision, preclude the states from engaging



in the complex balancing process (described above) which is required for the determination of precise effluent limitations for point sources. Thus, this case turns upon the question of whether Congress intended the state permit-grantor to be the Administrator's scrivener: recopying effluent limitation numbers provided by the Administrator rather than applying the factors listed in § 304(b). As will be explained below, Congress did intend that the states apply the Administrator's § 304 guidelines.

State power to formulate effluent guidelines for point sources derives from § 402, which provides for state administration of the National Pollutant Discharge Elimination System (NPDES) permit program.

The Act requires the Administrator to promulgate guidelines for state permit programs under § 304(h)(2), but provides in § 402(a)(5)<sup>11</sup> for approval of "interim" state permit programs even before these guidelines are published. Congress' intent that the states actively participate in the permit program is reflected in Representative Wright's explanation of the "interim" state program provision:

The interim program is not intended to be approved on a piecemeal basis. The managers understand the

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<sup>11</sup> Section 402(a)(5) provides in relevant part: "The Administrator shall authorize a State, which he determines has the capability of administering a permit program which will carry out the objective of this Act, to issue permits for discharges into the navigable waters within the jurisdiction of such State. The Administrator may exercise the authority granted him by the preceding sentence only during the period which begins on the date of enactment of this Act and ends either on the ninetieth day after the date of the first promulgation of guidelines required by section 304(h)(2) of this Act, or the date of approval by the Administrator of a permit program for such State under subsection (b) of this section, whichever date first occurs, and no such authorization to a State shall extend beyond the last day of such period. Each such permit shall be subject to such conditions as the Administrator determines is necessary to carry out the provisions of this Act. No such permit shall issue if the Administrator objects to such issuance."

language of the conference report to require and they expect the Administrator to authorize the State to handle the total permit program during this interim period and the Administrator is not authorized to delegate bits, pieces, categories, or other parts. He must authorize the State to carry out the full program for all categories of discharges. (118 Cong. Rec. H9129 (daily ed. October 4, 1972), 1 Leg. Hist., 261)

Representative Terry explained: "It is expected that the Administrator will encourage such interim programs." (118 Cong. Rec. 10219 (1972), 1 Leg. Hist. 388)

After the Administrator issues permit program guidelines under § 304(h)(2), he *must* approve state permit programs which meet the extensive, detailed requirements set forth in § 402(b):

"(b) At any time after the promulgation of the guidelines required by subsection (h)(2) of section 304 of this Act, the Governor of each State desiring to administer its own permit program for discharges into navigable waters within its jurisdiction may submit to the Administrator a full and complete description of the program it proposes to establish and administer under State law or under an interstate compact. In addition, such State shall submit a statement from the attorney general (or the attorney for those State water pollution control agencies which have independent legal counsel), or from the chief legal officer in the case of an interstate agency, that the laws of such State, or the interstate compact, as the case may be, provide adequate authority to carry out the described program. The Administrator *shall* approve each such submitted program *unless* he determines that adequate authority does not exist:

"(1) To issue permits which

"(A) *apply and insure compliance with, any applicable requirements of section 301, 302, 306, 307 and 403;*

"(B) are for fixed terms not exceeding five years; and

“(C) can be terminated or modified for cause including, but not limited to the following:

“(i) violation of any condition of the permit;

“(ii) obtaining a permit by misrepresentation, or failure to disclose fully all relevant facts;

“(iii) change in any condition that requires either a temporary or permanent reduction or elimination of the permitted discharge;

“(D) control the disposal of pollutants into wells . . .” (§ 402(b), emphasis added)

The quotation above constitutes only a portion of the detailed requirements for a state NPDES permit program.<sup>12</sup>

<sup>12</sup> Section 402(b) continues:

“(2)(A) To issue permits which apply, and insure compliance with, all applicable requirements of section 308 of this Act, or

“(B) To inspect, monitor, enter, and require reports to at least the same extent as required in section 308 of this Act;

“(3) To insure that the public and any other State the waters of which may be affected, receive notice of each application for a permit and to provide an opportunity for public hearing before a ruling on each such application;

“(4) To insure that the Administrator receives notice of each application (including a copy thereof) for a permit;

“(5) To insure that any State (other than the permitting State), whose waters may be affected by the issuance of a permit may submit written recommendations to the permitting State (and the Administrator) with respect to any permit application and, if any part of such written recommendations are not accepted by the permitting State, that the permitting State will notify such affected State (and the Administrator) in writing of its failure to so accept such recommendations together with its reasons for so doing;

“(6) To insure that no permit will be issued if, in the judgment of the Secretary of the Army acting through the Chief of Engineers, after consultation with the Secretary of the department in which the Coast Guard is operating, anchorage and navigation of any of the navigable waters would be substantially impaired thereby;

“(7) To abate violations of the permit or the permit program, including civil and criminal penalties, and other ways and means of enforcement;

“(8) To insure that any permit for a discharge from a publicly owned treatment works includes conditions to require adequate notice to the permitting agency of (A) new introductions into such works of pollutants from any source which would be a new source as defined in section 306 if such source were discharging pollutants, (B) new introductions of pollutants into such works from a source which would be subject to section 301 if it were discharging such pollutants, or (C) a substantial



The state role in administering the NPDES permit program implements one of the enumerated policies the Act, as set forth in § 101(b):

*It is the policy of the Congress to recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution, to plan the development and use (including restoration, preservation, and enhancement) of land and water resources, and to consult with the Administrator in the exercise of his authority under this Act. (§ 101(b) [emphasis added])*

The congressional debates on the Act explain the reasons underlying this declaration of policy. Congressman Blatnik stated the position of the House Public Works Committee:

*An effective water pollution control program must have significant participation at the regional and local level. Your committee believes that the majority of the program must be handled at that level of government which is sufficiently close to the problems to recognize them and to determine what is best for the waterway and area concerned. Obviously, these local and regional efforts must be within the framework and goals set out by Congress. However, let us not kid ourselves that the Federal establishment operating by itself can implement an effective water quality program. Unless we have meaningful local and State participation and not a Federal dictatorship, the program will founder on the rocks of the generally inflexible. Washington dictated approach. Local and State initiative will disappear. Those with the most incentive to work for local, State, and regional water quality will be stifled by Federal rigidity. We must*

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change in volume or character of pollutants being introduced into such works by a source introducing pollutants into such works at the time of issuance of the permit. Such notice shall include information on the quality and quantity of effluent to be introduced into such treatment works and any anticipated impact of such change in the quantity or quality of effluent to be discharged from such publicly owned treatment works; and

“(9) To insure that any industrial user of any publicly owned treatment works will comply with sections 204(b), 307, and 308.

not let this happen. We must preserve this local and State initiative. (118 Cong. Rec. 10206 (1972), 1 Leg. Hist. 355) [emphasis added]

Congressman Roe, a member of both the House Public Works Committee and the Conference Committee, explained that in the past inadequate federal laws had handicapped state enforcement efforts:

I think the second point which is highly germane in the misunderstanding that perhaps exists in this House is the Federal-State partnership. It is ludicrous for this body to review the legislative history, both the bills that were born and the carrying out of that legislation by the Federal Government, which has been a dismal failure, and then to come back and say the States have not done their job. The truth of the matter is that the Federal Government never provided the funds, nor were the laws effective, nor could they be litigated to the point where they could solve the problem they were supposed to in the first place.

I say this is a warning that to move this program back and put it solely in the hands of the EPA Administrator would be like taking a camel and trying to put it through the eye of a needle. And taking the State governments completely out of the whole issue would be a terrible mistake. Every time a piece of legislation passes that has to do with environment, or where there ought to be a true Federal-State partnership everybody comes back and says the State is not doing its job, when in fact, it is the Federal Government where the interminable delay is involved. (118 Cong. Rec. 10234 (1972), 1 Leg. Hist. 426-27)

Congressman Kluczynski noted that local decision-making could more effectively evaluate economic and social costs and benefits which (as explained above) are essential considerations in determining effluent limitations:

Mr. Chairman, I wholeheartedly support this bill, H.R. 11896. I support this bill because it is absolutely sound in concept. It assigns the responsibilities

where they can best be handled and *abandons the out-moded idea that all wisdom and resolution in confronting national problems is found within a 25-mile radius of the Capitol dome.*

The States must play a prominent part in making the water pollution law work. Why should we believe their conviction is any less than ours? *It is at the State and local levels where all the elements included in this bill come together and where the job of cleaning up the water must be merged with economic and social realities.* (118 Cong. Rec. 10209 (1972), 1 Leg. Hist. 363)

Congressman Clausen, a member of both the House Public Works Committee and the Conference Committee, quoted with approval from the testimony before the House Public Works Committee of Mrs. Donald Clusen, Chairman of the environmental program for the League of Women Voters:

As a general principle, we think that State governments are in the best position to establish requirements for meeting pollution abatement goals since they know the local conditions. (118 Cong. Rec. 10214 (1972), 1 Leg. Hist. 377)

Senator Muskie stated the view of the Senate Public Works Committee,<sup>13</sup> which coincides with the attitude of its counterpart in the House:

We in our committee have always felt, wholly apart from any philosophical views about States' rights and the balance of the Federal-State authority, that if we could have effective State programs supplemented by effective Federal programs, it was the best way to deal with the pollution problem, because it is too enormous in its scope to be handled entirely by Federal bureaucracy.

<sup>13</sup> Senator Randolph, Chairman of the Committee, explained:

A substantial portion of the powers to eliminate pollution provided in this bill rests with the States. Within the directives provided by Congress, the States must assume a major portion of the responsibility for cleaning our water of the pollutants that have befouled them for far too long. (117 Cong. Rec. 38805 (1971), 2 Leg. Hist. 1272)



So we have been promoting, probing, and pushing the States to fashion the necessary authority. That is what we have done in the bill.

Mr. Curtis. Is it the opinion of the Senator that the measure before us encroaches on the States in a lesser way than is now being done under the 1899 Refuse Act?

Mr. Muskie. Yes. The answer to that it is a clear-cut "Yes." (117 Cong. Rec. 38846 (1972), 2 Leg. Hist. 1366)

**2. The Act Requires the Administrator To Formulate Guidelines To Be Applied by the States, Rather Than Effluent Limitations Which Pre-empt State Action.**

Despite the unequivocal intent of Congress that the States play an *active* role (state "initiative" is a term which appears often in the legislative history) in the administration of the Federal Water Pollution Control Act, petitioner argues that § 301 of the Act provides that the Administrator by rulemaking can pre-empt the states by fashioning effluent limitations from his own guidelines. Under petitioner's scheme, the States would do no more than accept effluent limitation numbers handed down from above and insert them into permits.

Petitioner would have this Court believe that § 301, which says only that effluent limitations "shall be *achieved*" by specified deadlines, authorizes the Administrator to *promulgate regulations* setting effluent limitations. Petitioner relies principally upon § 301(e) of the Act to support its interpretation (Brief for Petitioner, pages 24-25). Section 301(e) provides:

"(e) Effluent limitations established pursuant to this section or section 302 of this Act shall be applied to all point sources of discharge of pollutants in accordance with the provisions of this Act.

Section 301(e) (which is the comparable provision to § 301(d) in both the House and Senate versions of the

bill) is not discussed in the Senate Report, House Report, or Conference Committee Report on the Act. Apparently, the only body whose analysis of § 301 was so thorough as to mention § 301(e) was the Environmental Protection Agency. In a letter from William Ruckleshaus, Administrator of the Environmental Protection Agency, to Congressman John Blatnik, Chairman of the House Committee on Public Works, Mr. Ruckleshaus explained § 301(d) (now § 301(e)) of H. R. 11896, which was eventually adopted by the Conference Committee:<sup>14</sup>

Section 301(d). Effluent limitations required by Section 301 would be *established and applied* to all point sources of discharges covered by the Act *by means of the permits issued under Title IV.*

We favor the approach whereby effluent limitations would be applied to dischargers through a permit mechanism. (House of Representatives No. 92-911, 92d Cong. 2d Sess. 157 (1972), 1 Leg. Hist. 344) [emphasis added]

Contrary to Congress' and EPA's understanding of this section, petitioner would interpret § 301(e) to authorize the establishment of effluent limitations by the Administrator by regulations under § 301. In fact, the *intent* of this section was quite the opposite: the effluent limitations referred to in § 301 are to be established "in accordance with the provisions of this Act"—a reference to other provisions of this Act, not § 301 itself. For example, effluent limitations "established pursuant to any *State* law or regulation" (§ 301(b)(1)(C), emphasis added) are clearly not established by the Administrator by regulation under § 301. Effluent limitations necessary to implement water quality standards (referred to in § 301(b)(1)(C) are determined according to procedures set forth in § 302, not § 301. Pretreatment standards (referred to in §§ 301(b)(1)(A), 301(b)(2)(A)) are established directly under

<sup>14</sup> S. Rep. No. 92-1236, 92d Cong., 2d Sess. 121 (1972), 1 Leg. Hist. 304)



§ 307. In fact, *all* of the effluent limitations referred to in § 301 are established pursuant to procedures set forth in other sections of the Act.

Moreover, the conclusion that "best practicable" effluent limitations are established as permit conditions under a permit proceeding is confirmed by the Report of the Senate Commerce Committee on Public Works:

Subsection (b) of this section [§ 304] requires the Administrator, within one year after enactment, to publish guidelines for setting effluent limitations reflecting the mandate of section 301, which will be imposed as conditions of permits issued under section 402. (S. Rep. No. 92-414, 92d Cong., 2d Sess. 51 (1971), 2 Leg. Hist. 1469)

The report of the Senate Committee on Public Works explains that with regard to "best practicable control technology", the factors listed in § 304 are to be applied to specific plants on an individual basis:<sup>15</sup>

The Administrator was directed to establish a "range of best practicable levels . . . within each industrial category."<sup>16</sup> (S. Rep. No. 92-414, 92d Cong., 1st Sess. 50 (1971), 2 Leg. Hist. 1468) [emphasis added] The states (or the regional administrator, in the absence of a state

<sup>15</sup> Senator Muskie confirmed the mandate for plant-by-plant application of the factors listed in § 304(b). Senator Mathias asked Senator Muskie whether plant-by-plant treatment was intended:

Mr. Mathias. Does section 301(b)(2)(A) on page 76 contemplate that a State, or the Administrator if appropriate, might be able to set the 1981 effluent limitations almost on an individual point source by point sources basis?

Mr. Muskie. Section 301(b)(2)(A) as well as section 301(b)(1) anticipate individual application of controls on point sources through the procedures under the permit program established under section 402.

Thus Senator Muskie affirmed Senator Mathias' interpretation that plant-by-plant treatment was to be provided. (117 Cong. Rec. 38855 (1971), 2 Leg. Hist. 1391)

<sup>16</sup> See also 118 Cong. Rec. H16873 (daily ed. October 4, 1972), 1 Leg. Hist. 169, H.R. Rep. No. 92-911, 92d Cong., 2d Sess. 156 (1972), 1 Leg. Hist. 843.

program) were to determine precise effluent limitations within the range set by the Administrator by applying the factors listed in § 304(b) to individual plants.

The sheer impracticability of allowing the Administrator to establish effluent *limitations* (as opposed to guidelines) for individual plants must be obvious. Moreover, Congress recognized that the superior knowledge of state officials concerning local conditions should be used to weigh the economic and social costs of effluent limitation levels. The federal guidelines were intended to establish both the decisionmaking framework and the boundaries for state-established effluent limitations.

A comparison of the § 304 ("best practicable") with the § 403 (ocean discharge) guidelines ends any doubt as to the mechanism for developing effluent limitations from guidelines. Section 402(b)(1) requires the Administrator to approve state permit programs "unless he determines that adequate authority does not exist: (1) to issue permits which (A) apply, and insure compliance with, and applicable requirements of sections 301, 302, 306, 307, and 403." [emphasis added] Like § 304, § 403(c) requires the Administrator to "promulgate guidelines" which include consideration of an impressively wide range of factors:

"(c)(1) *The Administrator shall* within one hundred and eighty days after enactment of this Act (and from time to time thereafter), *promulgate guidelines for determining the degradation of the waters of the territorial seas, the contiguous zone, and the oceans, which shall include:*

"(A) the effect of disposal of pollutants on human health or welfare, including but not limited to plankton, fish, shellfish, wildlife, shorelines and beaches;

"(B) the effect of disposal of pollutants on marine life including the transfer, concentration, and dispersal of pollutants or their byproducts through biological, physical, and chemical processes; changes in marine ecosystem diversity, productivity, and stability; and species and community population changes;

“(C) the effect of disposal, of pollutants on esthetic, recreation, and economic values;

“(D) the persistence and permanence of the effects of disposal of pollutants;

“(E) the effect of the disposal at varying rates, of particular volumes and concentrations of pollutants;

“(F) other possible locations and methods of disposal or recycling of pollutants including land-based alternatives; and

“(G) the effect on alternate uses of the oceans, such as mineral exploitation and scientific study.

“(2) *In any event where insufficient information exists on any proposed discharge to make a reasonable judgment on any of the guidelines established pursuant to this subsection no permit shall be issued under Section 402 of this Act.* [emphasis added]

Note that the state permit grantors are expected to make *judgments* (§ 403(c)(2)) based upon the guidelines, not be scribes who recopy numbers provided by the Administrator.

The bearing of the clear scheme of § 403 upon the less clear scheme of § 304 was not lost upon Congressman Robert Jones, the floor manager of the House bill. Mr. Jones reported to the House on the Conference Committee's changes. He, Jones, explained that the § 403 scheme is identical to the § 304 scheme, and explained that both required the states to apply the guidelines through state permit programs:

In answer to questions raised regarding changes made in Section 402, relating to State permit programs, and in Section 403, relating to ocean discharges, the record should show that the authority of the States to develop and administer a permit program under Section 402 for discharges into the territorial sea is the same as the authority under Section 402 for a State permit program

for other discharges. It is the responsibility of the Administrator of EPA to establish guidelines for State permit programs. The factors and considerations involved in setting guidelines for territorial sea discharges would necessarily differ in some respects from those established for discharges into other navigable waters. For example, *the Administrator should consider the unique situation in States where geography and other such factors have a substantial impact on the effects of the discharges on receiving waters.*

*Once guidelines are established for a State permit program under section 402, whether for discharges into the territorial sea or other navigable waters it is intended that the State shall have primary responsibility for determining whether a discharge complies with the guidelines.* If the State fails to carry out its responsibility or misuses the permit program, the Administrator is fully authorized to withdraw his approval of the State plan or in the case of an individual permit which does not meet regulations and guidelines in the act, preclude the issuance of such permit. It is intended, however, that the Administrator shall not take such action except upon a clear showing of failure on the part of the State to follow the guidelines or otherwise to comply with the law. (118 Cong. Rec. H9118 (daily ed. October 4, 1972), 1 Leg. Hist. 233-34) [emphasis added]

Mr. Jones does not mention effluent *limitations* established by the Administrator under the authority of § 301. Section 301 makes no mention of them either. The clear scheme of the § 403 guidelines explains the less clear scheme of § 304 guidelines. Both sets of guidelines are to be used by the states to formulate effluent limitations in order to comply with § 402(b)(1)(A), the provision which requires the states to issue permits which insure compliance with sections 301 and 403.

Thus the state, not the Administrator, formulates effluent limitations from the Administrator's guidelines. Congress



recognized that federal inflexibility should not straight-jacket the states' superior knowledge of local conditions.<sup>17</sup>

In recognition of the responsibilities delegated to the states, Congress enacted many provisions to insure that those responsibilities would not be abused. These provisions will be discussed below.

### **3. The Act Provides Ample Safeguards To Protect Against Abuses by the States.**

Congress was aware that if the states were not required to apply uniform national guidelines, some states might be tempted to relax their restrictions in order to induce industry to locate new facilities within that state's borders. Hence, Congress required all states to follow federal guidelines. As Congressman Blatnik explained:

We must preserve this local and State initiative. H. R. 11896 sets a frame work and the guidelines for State water quality programs. It then provides for State implementation, or, if the States do not do the job, Federal takeover. Also, and I emphasize this, let there be no question in your minds, this bill requires that State and regional programs follow stringent Federal guidelines. It will not allow the industrial equivalent of forum shopping. Each State's program will preclude this because they must be consistent with the guidelines. (118 Cong. Rec. 10206 (1972), 1 Leg. Hist. 355-56)

But Congress did not confuse uniformity with rigidity. To the contrary, differences in circumstances were not meant to be ignored when the states formulated effluent limitations in accordance with § 304 guidelines. As Congressman Clausen explained on behalf of the House Public Works Committee, the House bill was intended to require

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<sup>17</sup> As Congressman Blatnik pointed out: "Unless we have a meaningful local and State participation and not a Federal dictatorship, the program will founder on the rocks of the generally inflexible." (118 Cong. Rec. 10206 (1972), 1 Leg. Hist. 355)

consideration of individual factors for specific plants in order to assure "uniform" treatment:

Now, and I emphasize this, such "best practicable control technology" will be required even if the quality of the receiving waters do not require the imposition of effluent limitations consistent with best practicable control technology. This is a technological standard. *This is a standard that would be applied to all plants of a similar nature, regardless of location, if the applicable factors that I just enumerated were the same in each plant.* (118 Cong. Rec. 10215 (1972), 1 Leg. Hist. 378) [emphasis added]

The guidelines themselves are the primary means of controlling the way the states exercise their responsibilities. But if these fail, there are many other provisions in the Act which provide federal authority to enable the Administrator to force compliance with federal standards.

Section 402(c)(2) requires all state permit programs to conform *at all times* with the detailed requirements of sections 402 and 304(h)(2). Section 402(c)(3) empowers the Administrator to withdraw approval from a non-conforming program. Section 402(d) empowers the Administrator to veto any state permit which he determines to be outside the guidelines and requirements of the Act.

Sections 309(a)(2) empowers the Administrator to enforce the terms of any state permit or *all* permits of a state if he finds that the failure of a state to enforce permit conditions is widespread. Finally, § 303 gives the Administrator the power to disapprove any state water quality standard—and substitute his own—if the state standard is inconsistent with the applicable requirements of the Act.

Fully aware of the responsibilities it had delegated to the states, Congress provided the Administrator with ample authority to insure that those responsibilities would not be abused.

**C. THE VARIANCE PROVISION IS THE ONLY METHOD PROVIDED BY THE REGULATIONS WHICH ALLOWS THE STATES TO FINELY TUNE THE ADMINISTRATOR'S EFFLUENT LIMITATIONS FOR CATEGORIES OF DISCHARGERS.**

As discussed above, the Act requires the *states* to formulate effluent limitations requiring the application of the "best practicable control technology currently available" as defined by the Administrator under § 304. These effluent limitations must fall within a range of values within those guidelines, but specific effluent limitations are to be formulated by the states by applying the factors listed in § 304 under a framework set forth in the Administrator's guidelines. These effluent limitations are intended by Congress to be the result of a "finely tuned" balancing analysis, which must assure that a reasonable relationship exists between the economic, social, and environmental costs and benefits resulting from that effluent limitation. Superior state knowledge of local conditions is not to be smothered by inflexible federal regulations.

If the Administrator's "effluent limitation regulations" (issued under the guise of § 304 guidelines) are to withstand judicial scrutiny, they must be accompanied by a provision for flexibility. That is what the variance provision does.<sup>18</sup> It is immeasurably superior to petitioner's

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<sup>18</sup> The variance provision reads:

In establishing the limitations set forth in this section, EPA took into account all information it was able to collect, develop and solicit with respect to factors (such as age and size of plant, raw materials, manufacturing processes, products produced, treatment technology available, energy requirements and costs) which can affect the industry subcategorization and effluent levels established. It is, however, possible that data which would affect these limitations have not been available and, as a result, these limitations should be adjusted for certain plants in this industry. An individual discharger or other interested person may submit evidence to the Regional Administrator (or to the State, if the State has the authority to issue NPDES permits) that factors relating to the equipment or facilities involved, the process applied, or other such factors related to such discharger are fundamentally different from the factors considered in the establishment of the guidelines. On the basis of such evidence or other available information, the Regional Administrator (or the State) will make a written finding that such factors

impractical suggestion for introducing flexibility. Petitioner would require the Administrator himself to hold a full-blown rulemaking proceeding each time an applicant demanded a variance. (Brief for Petitioner, p.17)

However, the variance provision, as written, distorts the intent of Congress. Instead of encouraging the states to engage in a comprehensive balancing analysis, this provision would preclude state participation in applying the guidelines unless the applicant showed that his "factors" are "fundamentally different" from those considered by the Administrator in formulating the § 304 guidelines. Since the Administrator always claims to have considered all of the factors listed in § 304 when formulating all of his guidelines, a literal reading of the language of the variance provision would make it a nullity. Surely, this was not the Administrator's intent.

The variance provision is meaningless unless interpreted to authorize a state to examine the factors listed in § 304 to determine if there is a reasonable relationship between the economic, social, and environmental costs and benefits of the proposed effluent limitation. So interpreted, the variance provision would save the Administrator's rigid "effluent limitations" from fatal defectiveness due to their failure to comply with the requirements of the Act.

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are or are not fundamentally different for that facility compared to those specified in the Development Document. If such fundamentally different factors are found to exist, the Regional Administrator or the State shall establish for the discharger effluent limitations in the NPDES permit either more or less stringent than the limitations established herein, to the extent dictated by such fundamentally different factors. Such limitations must be approved by the Administrator of the Environmental Protection Agency. The Administrator may approve or disapprove such limitations, specify other limitations, or initiate proceedings to revise these regulations.



### III. CONCLUSION

This Court should uphold the concept that the guideline regulations are flexible and remand this case to the Administrator to amend his regulations to conform to the requirements of the Act, as set forth above.

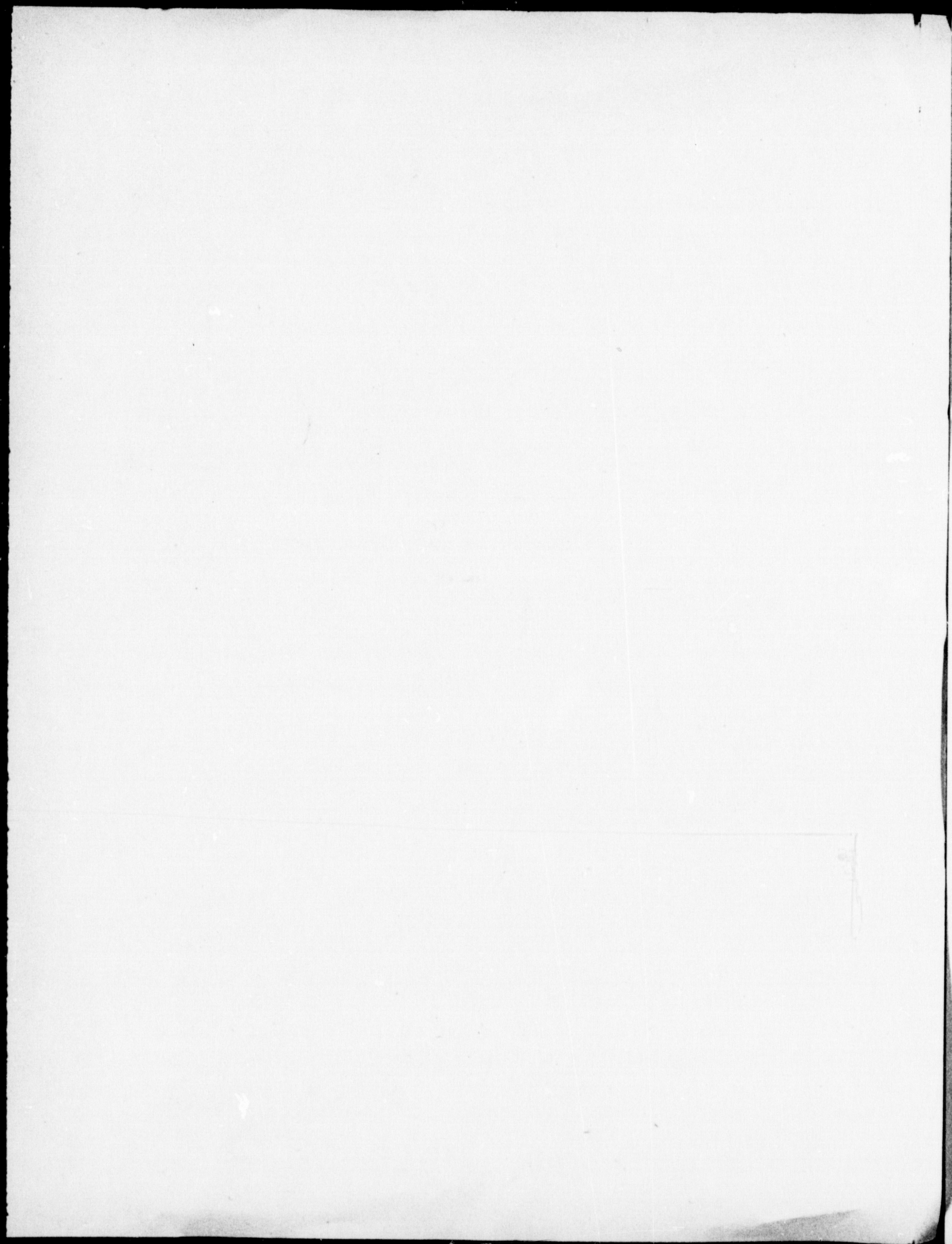
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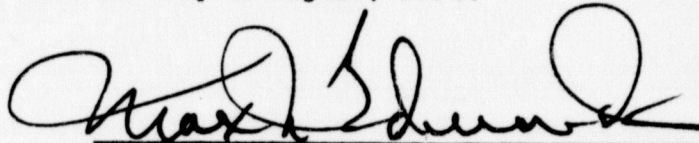
August, 1974



74-1258

CERTIFICATE OF SERVICE

I hereby certify that I served two copies of the Brief Amicus Curiae for the Chamber of Commerce of the United States of America upon Angus Macbeth, Esquire, Natural Resources Defense Council, Inc., 15 West 44th Street, New York, New York, 10036, attorney for petitioner, upon Raymond W. Mushal, Esquire, United States Department of Justice, Land and Natural Resources Division, Pollution Control Section, attorney for respondent and upon Robert C. Barnard, Esquire, Cleary, Gottlieb, Steen & Hamilton, 1250 Connecticut Avenue, N.W., Washington, D.C. 20036, by first class mail, postage prepaid this 23d day of August, 1974.

A handwritten signature in dark ink, appearing to read 'Max N. Edwards', is written over a horizontal line.

MAX N. EDWARDS  
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The Chamber of Commerce  
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